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No. 97-371

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS,

Petitioner,

—v.—

FINLEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF MORALITY IN MEDIA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

Morality in Media, Inc. ("Amicus"), as Amicus Curiae, files this brief in support of the Petitioners in this case, which is before this Honorable Court on the merits under the provisions of Rule 37(3)(a). The written consents of the Petitioners and Respondents have been requested and all parties have consented thereto in writing. The written consent of the Solicitor General has been filed by him with the Court. A copy of the written consent of the Respondents is being filed concurrently with this brief. Morality in Media has a special interest in this case because this organization has through the years posited indecent material as proscribable under appropriate circumstances.

Morality in Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states, and its Board of Directors and Advisory Board are composed of prominent businessmen, clergy and civic leaders.

The Founder and President of Morality in Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report" of the Commission, which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 58, notes 7 and 8 (1973). Morality in Media has also frequently participated as Amicus in cases before this Court, including *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Sable Communications v.*

FCC, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 116 S.Ct. 2374 (1996); and *American Civil Liberties Union v. Reno*, 117 S.Ct. 2329 (1997).

Morality in Media is filing this brief in support of the Petitioner because it believes its brief contains relevant matter that may not be brought to the attention of the Court by the parties.

SUMMARY OF ARGUMENT

Amicus first points out to this Honorable Court that the Respondents do not have a viable cause of action simply because they were applicants for a federal subsidy since there is no constitutional right to be subsidized by the american public. If there is any vagueness in the N.E.A. language, it does not give rise to discrimination or denial of First Amendment rights as to the Respondents. There is no cognizable injury as to them. While it is true that governmental subsidies may not be based on viewpoint discrimination, the language under contest does not discriminate on the basis of viewpoint or prohibition of the promulgation of ideas, it only requires that the N.E.A. "take into consideration" the manner of presenting their views and ideas. Amicus postulates that since the criteria for a grant or fellowship is "artistic excellence" or "artistic merit", then the requirement to "take into consideration" respect for the diverse beliefs and values of the American people would not prevent the N.E.A. from determining in any or all applications for a grant that the criteria overrides any indecency or blasphemy. In other words, there is no prior restraint or discrimination even if vagueness inheres in the language because the statute does not provide that you shall not receive a grant if your proposed work is indecent or blasphemous.

Next Amicus suggests that the phrase "General Standards of Decency" is not vague. It points out that, since First Amendment rights or criminal penalties are not implicated, the scrutiny, relative to imprecision, should be relaxed as in the determination of whether vagueness exists in non-criminal, non-First Amendment cases. It then goes on to indicate that that phrase is not vague since one, it has been "defined" by this Honorable Court, two, various cases have said that "indecent" is not vague under their interpretation of Pacifica,[1] and lastly that it means the same as "Contemporary Community Standards" when used as a valid rule to determine prurient appeal and patent offensiveness in obscenity cases.

Amicus next turns its attention to an analysis of the words "Respect for the Diverse Beliefs and Values of the American People" and suggests that any vagueness inherent in that phrase can be cured by the Court by authoritative construction. Adverting to the debate in the House and Senate in order to discern what was on the minds of the legislators when they voted in favor of this clause, it finds that the issue that incensed those who spoke were the Serrano (Piss Christ abomination) and the Mapplethorpe (Bull Whip Homoerotic) production both of which had apparently been financed by N.E.A. grants. An examination of the debates indicate a preoccupation with these two works. Since the Mapplethorpe exhibit was a sadomasochistic scene such would be covered by the obscene or decency language of the N.E.A. The Serrano effort, was pure blasphemy. Amicus therefore urges this Honorable Court to conflate the term "Respect for the Diverse Beliefs and Values of the American People" to "taking into consideration whether or not blasphemous."

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[1] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Finally, Amicus urges this Court to sever this phrase if it finds it vague or incapable of a constitutional authoritative construction leaving a requirement "to consider" the "General Standards of Decency".

ARGUMENT

I. The Respondents Do Not Have A Viable Cause of Action Since No Constitutional Rights Are Being Violated

It may be true, in an abstract sense, that the Respondents have suffered some damage by denial of fellowship by the N.E.A. If so it is "damnum absque injuria."

The denial of fellowships does not translate into a legally cognizable cause of action against the N.E.A. In fact, it would appear that they suffered no legal injury. Their claimed "injuria" is that they have been denied constitutional rights by reason of the claimed vagueness and viewpoint discrimination of the 1990 Amendments to the N.E.A. Act. However, no where in the Constitution do we find that vagueness of an Act creating such a subsidy gives rise to a cause of action. The viewpoint discrimination argument fails insofar as "General Standards of Decency" is concerned since no "idea" is proscribed, but only the manner of expressing the same. It is the view of Amicus that the phrase "Taking Into Consideration Respect for the Diverse Beliefs and Values of the American Public", if authoritatively construed by this Honorable Court to be conflated by authoritative construction into the words "Taking Into Consideration Whether or not Blasphemous", would avoid both vagueness, overbreadth, and viewpoint discrimination. It is apparent that one may express a belief that no God exists or rail against such a belief in a manner that avoids

blasphemy. Again it is not the idea, but the manner of expression of the same that is being "considered".[2]

As we indicate below in Argument II, the phrase "General Standards of Decency" is not vague, nor as indicated in Argument III, neither is the phrase "Whether or not Blasphemous."

Amicus submits at this point that there is no denial of a subsidy based on viewpoint. All are treated equally. All may apply. All may express any viewpoint they may advocate provided they do so in a decent and non-blasphemous manner, including a viewpoint that indecency is a good thing and should not be regulated or that "There is no God." It is not the promulgation of an idea, but the manner in which it is attempted or accomplished that may be regulated.

Just as 18 U.S.C. 1464 does not forbid the promulgation of ideas, but only the manner in which they are presented, so too would the phrases "General Standards of Decency" and "Whether or not Blasphemous" not prohibit consideration of various viewpoints if expressed appropriately. It is to be observed that 18 U.S.C. 1464 prohibits the use of obscene, indecent, or profane language none of which has yet been found unconstitutional as viewpoint oriented. The use of the word "profane" in 1464 augurs well for the use of the word blasphemous in the

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[2] It is well to note, at this point, that Indecency and Blasphemy, under such a construction as Amicus proposes, is not forbidden in a grant application. Theoretically, the N.E.A. could determine that either "artistic excellence" or "artistic merit" overrides any indecency or blasphemy (954(d)(1)).

construction suggested by Amicus.[3]

Representative Shumway, during debate on the 1990 revision of the N.E.A. said:

> "Nowhere is it written that artists . . . are entitled to 'no strings' federal support. Where Uncle Sam giveth, Uncle Sam generally establishes conditions and criteria concerning applicants for the 'gift.'"[4]

Mr. Weiss of New York, on the opposite side of the debate, claimed that the language now under consideration denied First Amendment Rights stating:

> "The Supreme Court has repeatedly held that the First Amendment does not disappear because the taxpayer picks up the tab. In a unanimous opinion in 1983, Chief Justice William Rehnquist wrote:
>
> > 'Neither by subsidy or penalty may the government aim at the suppression of dangerous ideas.'"[5]

Now, as previously indicated, insofar as we are considering "Consideration" of "General Standards of Decency," the suppression of ideas concept put forward by Representative Weiss has no application. By this language we are not prohibiting the consideration of an idea (however

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[3] "Profane" is defined as "to treat (something sacred) with abuse, irreverence or contempt". Websters New Collegiate Dictionary. (7th ed. 1969).

[4] 136 Cong. Rec. H9437 (Oct. 10, 1990) (statement of Rep. Shumway).

[5] 136 Cong. Rec. H9448 (Oct. 11, 1990) (statement of Rep. Weiss).

vile) but the manner of its presentation based, as Chaplinsky[6] says, on the social interest in order and morality.

Insofar as we suggest the conflation of "and respect for the diverse beliefs and nature of the American public" into the term, "whether or not blasphemous" we are not prohibiting a discussion or an expression of a view that blasphemy is desirable or should be permitted. We are suggesting, by this language, that such expressions should not be expressed by the use of blasphemous words or images, and that, if they are, the N.E.A. in making grants will take that fact into consideration as one of the factors (but not necessarily a controlling one) in making its decision.

The case of Rust v. Sullivan[7] supports the right of the N.E.A. to take indecency and blasphemy into consideration. As was said there:

> "The government has not discriminated on the basis of viewpoint, it has merely chosen to fund one activity to the exclusion of the other."

The Rust case concepts apply to both "General Standards of Decency" and "Whether or not Blasphemous." Congress, under Rust, can establish such criteria especially where there are alternate means of communicating indecency and blasphemy by private funding.

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[6] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[7] 500 U.S. 173, 193 (1991).

II. The Phrase "Take Into Consideration General Standards of Decency" is not Unconstitutionally Vague.

1. The Vagueness Doctrine is Normally Confined To Criminal Cases.

It is a fundamental principle of due process that the state may not hold an individual criminally liable for conduct which he could not reasonably understand to be proscribed. United States v. Harriss[8]; Grayned v. City of Rockford[9] (Emphasis Supplied).

Both the Coates[10] case and the Gougen[11] cases quoted below by the Ninth Circuit, were criminal cases. The Coates case quotes for its authority Connally v. General Construction Company[12] but that too, involved a criminal situation.

2. When the Vagueness Doctrine is Applied to Non Criminal Cases Greater Tolerance of Imprecision is the rule

It is clear that where a man must act on peril of criminal prosecution the doctrine of vagueness has clear applicability but this is not so where no criminal penalties are

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[8] 347 U.S. 612 (1954).

[9] 408 U.S. 104 (1972).

[10] *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

[11] *Smith v. Gougen*, 415 U.S. 566 (1974).

[12] 269 U.S. 385 (1926).

involved.

As this Honorable Court has told us, there is greater tolerance of enactments with civil rather than criminal penalties. because the consequences of imprecision are qualitatively less severe Village of Hoffman Estates v. Flipside.[13]

This Supreme Court in Hoffman Estates[14] said:

> "These standards (for evaluating vagueness) "should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates-as well as the relative importance of fair enforcement-depend in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."

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[13] 455 U.S. 489 (1982).

[14] at 455 U.S. 498.

An applicant for a grant is not going to be taken by surprise by the requirements of the N.E.A. statute. It will be well known to him or her by the nature of the grant process and his inquiry to the N.E.A. He or she, as the Hoffman Estates case says, "Can be expected to consult relevant legislation in advance of action". In addition, the N.E.A. Chairperson is authorized and directed to issue administrative regulations under Section 954(d). Just as the FCC clarified the meaning of "indecent" in Pacifica, so too can the Chairperson clarify the meaning of "General Standards of Decency".[15]

In Winters v. New York,[16] we find at page 515 the following:

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."

There are a number of lower court cases that indicate that unless there is fine or imprisonment involved, the standard of certainty is relaxed. As was said in one of them, Ross v. Springfield School District,[17] "The void for vagueness doctrine is generally confined to penal sanctions."

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[15] "The theme that, 'The constitution does not require impossible standards' *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947) is a frequently recurring one in the Court's opinions...It has consistently sustained statutory formulas of relationships where more precise articulation would have been incapable of administration." A.G.A., *The Void For Vagueness Doctrine in the Supreme Court*, 109 Pa. L. Rev. 67-116 (1960).

[16] 333 U.S. 507 (1948).

[17] 641 P.2d 600, 607 (Or. Ct. App. 1982), *rev'd other grounds*, 657 P.2d 188 (Or. Sup. Ct. 1982).

In D.C. v. City of St. Louis,[18] the Eighth Circuit said at page 654:

> "When violations carry criminal penalties, a strict test of specificity is applied in reviewing the vagueness of a statute."

In Keefe v. Library of Congress,[19] the District Court says:

> "Vagueness scrutiny under the Due Process Clause is applied with varying force depending on the circumstances. It applies less strictly to enactments concerned with economic regulation, those involving only civil penalties, and those that contain a scienter requirement which mitigates the problem of adequacy of notice. It applies with greater strictness to criminal laws, and laws implicating constitutionally protected rights, such as the First Amendment...A final factor affecting the strictness of the vagueness determination is the existence of any administrative avenue by which the employee can resolve any ambiguity as to the meaning of the regulation at issue and its applicability to the employee's conduct."

The Fifth Circuit in Harper v. Lindsay,[20] stated:

> "The prohibition against excessive vagueness does not invalidate every enactment which could have been drafted with greater precision".

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[18] 795 F.2d 652 (8th Cir. 1986).

[19] 588 F.Supp. 778 at 789 (D.D.C. 1984) *modified on other grounds*, 777 F.2d 1573 (D.C.Cir. 1985).

[20] 616 F.2d 849 at 851 (1980).

As indicated, in Argument I above, the artist does not have a First Amendment right to obtain or be considered for a N.E.A. grant. His work is not being modified, banned or prohibited. He or she retains his or her Freedom of Speech and Freedom of the Press. The other factors mentioned by the Eighth Circuit and prior decisions of this Honorable Court indicate that relaxed scrutiny should be applied since the appellant for a grant can consult the N.E.A. rules and regulations for clarification of the phrase "General Standards of Decency" or "Diverse Beliefs and Values of the American People". If dissatisfied with a rule or regulation or its application he or she may, assuming standing exists, seek review in an appropriate legal tribunal.

3. The Phrase "General Standards of Decency" Is Not Unconstitutionally Vague.

This Honorable Court has not had any great difficulty in the past in finding that the word indecent has a generally accepted meaning. This Honorable Court has given us its interpretation of the word "indecent" as used in 18 U.S.C. 1464 when it said in FCC v. Pacifica Foundation, at 98 S.Ct 3035:[21]

> "The normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality.'

[21] The *Pacifica* court also tells us at page 3039:

"These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said, 'Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality', *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)."

At 3036, in footnote 15, that Court says of Justice Harlan's opinion in Manual Enterprises v. Day,[22]

> "At one point, he used 'indecency' as a shorthand term for 'patent offensiveness'.

The Southern District of New York in Shea v. Reno,[23] stated:

> "Section 223(d)" (of the CDA) "essentially codifies the FCC definition of indecency sustained in a particular factual context by the Supreme Court in Pacifica. Although the Pacifica Court never specifically addressed whether the FCC's definition was unconstitutionally vague, the Court's conclusion that the broadcast at issue was "indecent" and the fact that the Court quoted elements of the FCC's definition of indecency with approval, see 438 U.S. at 789, has been read to foreclose a vagueness challenge to the FCC's definition of indecency for the broadcast medium. See Act I, 852 F.2d 1339-40."

Other cases also indicate that adopting the FCC's Pacifica definition in other media cures any potential vagueness.[24]

[22] 370 U.S. 478 (1962).

[23] 930 F.Supp. 916,935 (1996).

[24] *Cf., Alliance For Community Media v. FCC*, 56 F.3d 105, 129 (D.C. Cir. 1995); *Dial Information Services Corp. of New York v. Thornburgh*, 938 F.2d 1535, 1540 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992); *Information Providers Coalition v. FCC*, 928 F.2d 866, 876 (9th Cir. 1991).

It is interesting to note the opinion of Judge Dalzel in ACLU, et al. v. United States Department of Justice, 929 F.Supp. 824, 868-870 (E.D. Pa. 1996) holding that the definition of indecency used in the CDA was not vague and saying at 868:

> "These cases recognize that the FCC did not define indecency for cable and dial-a-porn in a vacuum. Rather it borrowed from...Pacifica."

Now it is apparent that, we are, in the instant case, determining whether the phrase "Standards of Decency" is vague or whether the word "Decency" itself is vague. It is obvious that the word "Decency" simply means "Not Indecent"-so once having determined the meaning of "Indecent" we have clarified the term "Decency". This Honorable Court has already defined Indecent in the Pacifica case as "Non Conformance With Accepted Standards of Morality". This Honorable Court, could if it wished authoritatively construe the word "Indecent" to have the meaning found by the FCC in Pacifica. We urge this Honorable Court to stick with it's prior definition and rule that "Conformance With Accepted Standards of Morality" cures any vagueness. After all, this is the Court's own definition.

One might argue that accepted standards of morality is in itself vague. To answer this we draw the attention of the Court to the elements of the obscenity definition. The test for the two prongs of the obscenity triad is determined by the applications of contemporary community standards to determine patent offensiveness and prurient appeal. Since this is not vague how can Accepted Standards of Morality be vague? The application of community standards is the application of accepted standards of morality relative to sexual matters. As Judge Hand said in 1913, obscenity is the critical point between candor and shame at which the community may have arrived here and now. Both Prurient

Appeal and Patent Offensiveness are morality terms and, in effect, to determine if something appeals to pruriency and is patently offensive we must apply the discerned community "Standards of Morality" in relation to the object or works at issue.

The Supreme Court did not find objectionable the charge to the jury found in Hamling v. United States,[25]:

> "The trial court instructed the jury that it was to judge the obscenity . . . of the brochure by reference to 'what is reasonably accepted according to the contemporary community standards of the community as a whole . . . Contemporary Community Standards means the standards generally held throughout this country concerning sex and matters pertaining to sex. This phrase means, as it has been aptly stated, the average conscience of the time and the present critical point in the compromise between candor and shame, at which the community may have arrived here and now."

It is clear that the obscenity definition and the first and second prong thereof, are judged by the morals of the community and the suggested tests cause no unconstitutional vagueness. If this is so, then there is no vagueness in "accepted standards of morality." We already are using this to determine obscenity. "Shame" is a "morality" word.

As was said in Burstein v. United States,[26] obscenity offends the common sense of decency and modesty of the

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[25] *Hamling v. United States*, 418 U.S. 87, 102 (1974).

[26] 178 F.2d 665, 667 (9th Cir. 1949).

community or as said in United States v. Wedelstedt,[27] "Community standards are aggregates of the attitudes of average people."

If we refer to Pacifica we find that the governmental justification for inhibiting indecency is squarely based on morality when the Court quoting Chaplinsky, indicates that "any benefit is outweighed by the social interest in order and morality". We are therefore justified in using as our touchstone "Conformity with Accepted Standards[28] of Morality" as a phrase equal in clarity to Contemporary Community Standards and as discernible.

III. Whatever Vagueness Inheres in the Phrase "The Diverse Beliefs and Values of the American Public" can be Cured by Authoritative Construction.

It is fundamental law that an Act of Congress will, in the first instance, be presumed to be constitutional and if there is curable uncertainty that it will be authoritatively construed by this Honorable Court so as to render it constitutional.

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[27] 589 F.2d 339, 349 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979).

[28] Black's Law Dictionary (6th ed. 1990) refers to the word "standard" as meaning stability, general recognition and conformity to established practice, *Standard Accident Ins. Co. v. Standard Surety and Casualty Co.*, 53 F.2d 119,120 (S.D.N.Y. 1931).

The concern of Congress in enacting the 1990 Amendments to the N.E.A. and especially 954(d)'s language relative to "Respect for the Diverse Beliefs and Values of the American Public" was, as Amicus interprets the debate, a belief that prior grants by the N.E.A. especially, "Piss Christ" by Serrano should not have been awarded since they denigrated the dignity of a person believed by a majority of the American Public to be God Almighty and the further belief that Congress should not "sponsor" such efforts. This is made clear by the quotations from the Congressional debates." The Rohrbacher amendments (which were not adopted but illustrate the concern) prohibited inter alia,

> "Federal funds . . . that denigrates religious beliefs..."[29]

The Williams Coleman-Henry Amendment, which is the language under challenge, required the N.E.A.

> "to take into consideration general standards of decency and respect for the diverse beliefs and values of the American public".

Some of the comments on why Congress was considering that language came from both sides of the House. Here are some examples:

> Mr. Yates-"All we hear from the other side is two grants: Mapplethorpe, Serrano, Mapplethorpe, Serrano, Mapplethorpe, Serrano."[30]

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[29] 136 Cong. Rec. H9407 (Oct. 11, 1990) (statement of Rep. Pashayan).

[30] 136 Cong. Rec. H9417 (Oct. 11, 1990) (statement of Rep. Yates).

Mr. Rohrbacher- refers to "Our money going to attack Jesus Christ and submerging Jesus Christ in a bottle of urine or to portray Jesus Christ as a heroine addict."[31]

Mr. Helms said,
"Well, what did we get from the N.E.A.'s experts...They gave us Andres Serrano blasphemous works and Robert Mapplethorpe's repulsive photos."[32]

Mr. Helms- mentions on page S18002:
"I will never forget that occasion to express our outrage that the National Endowment for the Arts had subsidized an artist who put a crucifix in a vat of his own urine, taken a picture of it, and gave it a mocking degrading title. He went out of his way to insult the Christian community...taxpayers were forced to help honor...this so called art, denigrating our Lord, Jesus Christ."[33]

Mr. Hyde in supporting the Regula Amendment (not adopted) refers to the Mapplethorpe and Serrano photos.[34]

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31 136 Cong. Rec. H9418 (Oct. 11, 1990) (statement of Rep. Rohrbacher).

32 136 Cong. Rec. S17990 (Oct. 24, 1990) (statement of Sen. Helms).

33 136 Cong. Rec. S18002-3 (Oct. 24, 1990) (statement of Sen. Helms).

34 136 Cong. Rec. H9682 (Oct. 15, 1990) (statement of Rep. Hyde).

In the Senate debate, Mr. Wirth noted,
"Last year in reaction to the support to the works of Andres Serrano, and Robert Mapplethorpe, Congress cut the appropriation for the N.E.A. by $45,000 . . ."[35]

Mr. Chaffee,
"Last year the N.E.A. came under internal Congressional scrutiny for having indirectly supported certain distasteful exhibits by two artists, Robert Mapplethorpe and Andres Serrano."[36]

Mr. Helms-(in reference to the Hatch Amendment)-
"The pending amendment is nothing but another attempt by the supporters for the Arts and specifically Mapplethorpe, Serrano, and all the rest to perpetuate a snow job." (136 Cong. Rec. S17990).

Mr. Roth adds his concept of the language-
"What we are proposing is preventing the National Endowment for the Arts from using tax dollars to fund...works denigrating religious beliefs or an individual's race or sex and attacks desecrating the U.S. flag."[37]

Mr. Dornan (on explaining his vote on the Crane Amendment to abolish the N.E.A.) states:

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35 136 Cong. Rec. S16635 (Oct. 24, 1990) (statement of Sen. Wirth).

36 136 Cong. Rec. S17981 (Oct. 24, 1990) (statement of Sen. Chaffee).

37 136 Cong. Rec. H9422 (Oct. 11, 1990) (statement of Rep. Roth).

> "If the arts community has said 'Serrano's blasphemy against the crucified Christ and Mapplethorpe's homoerotic photographs...are garbage which should never have been funded' then I am sure we would not be going through this exercise...Serrano's loathsome pictures of Christ was both blasphemous and bigoted."[38]

It is the contention of Amicus that viewed in light of the primary concern of Congress to prevent Serrano type excesses that the phrase under consideration can be interpreted as a concern for blasphemy and therefore the phrase "consider...diverse beliefs and values of the American public" can be authoritatively construed and conflated into the phrase "whether or not blasphemous." Blasphemy, of course, is a common law crime.

In the alternative, this Court could rule that the authority in the statute for the Chairperson to make rules and regulations clarifying this term (as the FCC did with the term indecent) warrants a refusal to strike down this statute on the ground of vagueness until such time as the Chairperson can interpret this language. In other words, it was premature for the Ninth Circuit to act until such interpretation has been made and tested.

IV. At All Events the Phrase "Respect for the Diverse Beliefs and Values of the American Public" Can Be Severed.

If the statutory language above is believed to be incurably overly broad, this Honorable Court can save the

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[38] 136 Cong. Rec. H9439 (Oct. 11, 1990) (statement of Rep. Dornan).

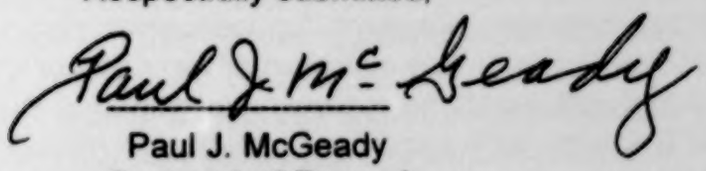
balance of the language of 954(d)(1) simply by severing this believed to be vague language. Such action is proper if the balance of such statutory language can stand on its own and this Court believes that Congress would still have enacted the statute without the offending language.

Now it is apparent "taking into consideration general standards of decency" can stand on its own and needs no underpinning from the balance form 954(d)(1). It is obvious too that the debates and the language of the statute reflected these alternate concerns for indecency and blasphemy. It comes down to the question of whether or not Congress would still want the statutory language if it required the N.E.A. to still consider indecency (embodied in the Mapplethorpe example and others) but lost the requirement relative to respect for the diverse beliefs and values of the American people. It is Amicus's contention and belief that yes! Congress would still want to preserve the considerations of "General Standards of Decency" as indicated by the language and emotions vented in the debates and on the theory that a half-a-loaf is better than none.

CONCLUSION

For all the above, Amicus urges that the statute be sustained as is, or that it be authoritatively construed to sustain its constitutionality, or if the phrase "respect for the diverse beliefs and values of the American public" is believed to be unconstitutionally vague, that phrase be severed and the balance of the statute saved.

Respectfully submitted,



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